IN THE

# Supreme Court of the United States

October Term, 1979
No. 79-78

EDDIE JACKSON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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The petitioner Eddie Jackson respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 17, 1979.



## OPINIONS BELOW

The opinion of the court of appeals (App., infra, pp. 1a-4a) and the opinion of the district court (Id., pp. 5a-10a) are not reported.

## JURISDICTION

The judgment of the court of appeals was entered on April 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the rule of Franks v. Delaware, permitting impeachment of factual statements made in an affidavit supporting a search warrant, is applicable to statements required in a wiretap application concerning exhaustion of ordinary investigative procedures.

2. Whether the requirement of 18 U.S.C. § 2518(1)(c), that a wiretap application contain a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," can be satisfied where the averments concerning such other investigative procedures are false and the statement completely omits relevant information about

the availability of a significant non-wiretap investigatory procedure.

3. Whether the Fourth Amendment forbids federal agents from entering a private dwelling without a warrant and in the absence of exigent circumstances for the purpose of arresting the occupants of the dwelling.

4. Whether evidence initially seized unlawfully as a result of a warrantless entry into a private dwelling may be used at trial by virtue of a subsequently obtained search warrant authorizing seizure of the evidence.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment, United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 2518 (in relevant part)

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> > (a) the identity of the investigative or law enforcement officer making the application, and the officer, authorizing the application.
> >
> > * * * * *
> >
> > (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or

why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that --

* * * * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * * * *

(4) Each order authorizing or approving the interception of any wire or oral communications shall specify --

* * * * *

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application;

* * * * *



(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that --

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such a motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

* * * * *

## STATEMENT OF THE CASE

Petitioner was indicted on January 4, 1972, in the United States District Court for the Eastern District of Michigan. Count one of the 16-count indictment, No. 46597, charged a single conspiracy to manufacture, distribute and possess heroin and cocaine in violation of 21 U.S.C. § 846, and named 17 defendants and 15 unindicted co-conspirators. Counts Two through Sixteen charged each defendant with substantive violations of 21 U.S.C. § 841 in connection with possession of narcotics. In a companion indictment, No. 46598, the 15 unindicted co-conspirators in indictment No. 46597 were charged with the identical offenses, and the 17 defendants in indictment No. 46597 were named as unindicted co-conspirators.

Following consolidated pre-trial proceedings, jury trials were waived and both indictments were tried simultaneously before Hon. John Feikens and Hon. Phillip Pratt. On July 22, 1974, Judge Feikens found petitioner guilty of conspiracy and 13 of the substantive counts. Petitioner was sentenced to concurrent fifteen-year terms of imprisonment on counts 1, 3, 4, 6, 7, 8, 9, 10, 11 and 12, to be served consecutively with concurrent five-year terms of imprisonment on counts 13, 14,



15 and 16, plus a committed fine of $5,000 on each count and a special three-year parole term.

Petitioner's convictions were affirmed on direct appeal, United States v. Woods, 544 F.2d 242 (6th Cir. 1976), and a petition for writ of certiorari was denied, 431 U.S. 954 (1977).

On August 7, 1978, petitioner filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255. The grounds for the motion included the following: (1) petitioner's conviction was obtained by the use of evidence gained from unlawful electronic surveillance in that the government's application for a wiretap order was materially false and did not include the "full and complete st[illegible]ement" concerning other investigative procedures required under 18 U.S.C. § 2518(1)(c) and that under Franks v. Delaware, 438 U.S. 154 (1978), an evidentiary hearing was required on this issue; (2) petitioner's conviction was obtained by the use of evidence gained from an unlawful search and seizure in that the evidence was seized during a warrantless arrest of petitioner in a private dwelling; and (3) the sentences petitioner received were multiplicitous. (A. 54-65).[1/]

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1/ "A." page references are to the Appendix filed by petitioner in the court of appeals.

In a memorandum opinion and order filed September 12, 1978, the district court denied the motion to vacate sentence in all respects. (App., infra, pp. 5a-11a). With regard to the falsity and incompleteness of the government's wiretap application, and the request for an evidentiary hearing on this issue, the district court held that the procedures set forth in Franks v. Delaware did not apply:

> The Supreme Court's holding in Franks does not apply to petitioner's attempt to attack the allegations concerning other investigative procedures that had been tried or appeared unlikely to succeed. The Franks holding goes to the issue of probable cause, a constitutional issue. Petitioner is challenging the satisfaction of the requirements of a statute dealing with alternate methods of investigation. There is no question but that the affidavit established probable cause, and the procedures set out in Franks do not apply.

(Id., p. 9a). The court refused to consider the other grounds raised in the motion, stating that they had been previously litigated on direct appeal of the conviction. (Id., pp. 6a-7a).

On the issue of the falsity and incompleteness of the government's wiretap application, the court of appeals held that petitioner was not entitled to an evidentiary hearing under Franks v. Delaware because the affidavit in question would not be "insufficient as a matter of law" if the false allegations were disregarded. (App., infra, p. 2a). The court refused to reconsider petitioner's claim concerning the unlawful seizure of evidence, stating that the issue had been fully addressed in its prior opinion. (Id., p. 1a).[2/]



## REASONS FOR GRANTING THE WRIT

### I.

IN HOLDING THAT PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING ON THE ISSUE OF THE FALSITY AND INCOMPLETENESS OF THE GOVERNMENT'S WIRETAP APPLICATION THE COURT BELOW HAS MISAPPLIED THIS COURT'S DECISION IN FRANKS V. DELAWARE AND MISINTERPRETED 18 U.S.C. § 2518(1)(c).

The court of appeals held that petitioner was not entitled to an evidentiary hearing on the issue of the falsity and incompleteness of the government's wiretap application because he did not make the preliminary showing of materiality required under Franks v. Delaware, 438 U.S. 154 (1978). In

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[2/] On the issue of multiplicitous sentences the court of appeals reversed and remanded, ordering five of the sentences vacated. (App., infra, pp. 2a-4a).

so holding, the court clearly misinterpreted Franks and misconstrued 18 U.S.C. § 2518(1)(c).[3/]

As a precondition to the use of electronic surveillance, Congress provided, in 18 U.S.C. § 2518(1)(c), that an application for an interception order must include:

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . .

In turn, the judge to whom the application is submitted must determine, prior to issuing an interception order, that:

> normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . .

3/ The district court's holding that the impeachment procedure established in Franks is not applicable to § 2518(1)(c) averments is obviously incorrect. The showing required by § 2518(1)(c) is clearly a fundamental, constitutional prerequisite for electronic surveillance that stands on equal footing with the required demonstration of "probable cause." See United States v. Giordano, supra, at 515; Note, Electronic Surveillance, Title III, And The Requirement of Necessity, supra, at 577-586; ABA Project on Minimum Standards for Criminal Justice--Standards

[cont'd following page]



18 U.S.C. § 2518(3)(c). See United States v. Giordano, 416 U.S. 505, 515 (1974); Note, Electronic Surveillance, Title III, And The Requirement of Necessity, 2 Hastings Const. L.Q. 571 (1975).

The Garibotto Affidavit

The government attempted to satisfy § 2518(1)(c) in this case through an affidavit of Agent Ronald Garibotto (sworn to on November 11, 1971) submitted in support of its wiretap application.[4/] The affidavit stated that "normal investigative procedures reasonably appear to be unlikely to succeed" (¶ 3(c)), and in support of this contention alleged the following:

3/[cont'd]Relating to Electronic Surveillance (Approved Draft 1971), at 139-140. Moreover, any falsity or incompleteness in an investigating officer's affidavit submitted in support of a wiretap application would frustrate the internal approval procedure that is an essential statutory requirement for electronic surveillance. See United States v. Giordano, supra, at 527-528.

4/The government obtained two orders authorizing the wiretapping of a telephone in this case. The original order, authorizing 20 days of interception, was obtained on November 11, 1971, and an extension order authorizing an additional 15 days of interception was obtained on December 1, 1971. The November 11 Garibotto affidavit was submitted in support of the applications for both orders.

19. Normal investigative procedures have not succeeded in establishing the full extent of the activities of Eddie JACKSON and George BLAIR relating to their purchase or sale of controlled substances, nor has Eddie JACKSON's and George BLAIR's source of supply been identified or established. Based on my knowledge and experience as a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs, and the experience of Supervisory Agents and other Special Agents of the Bureau of Narcotics and Dangerous Drugs, normal investigative procedures reasonably appear to be unlikely to succeed in establishing the identities of Eddie JACKSON's and George BLAIR's co-conspirators, aiders and abetters, their places of operation for their transportation of controlled substances to the Detroit, Michigan area and for their manufacture and distribution of controlled substances within the Detroit, Michigan area, and their times, places, schemes, and manners for selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances.

My experience and the experience of other Federal Agents has shown that narcotics (controlled substance) raids and searches have not, in the past, resulted in obtaining evidence of who the raided violator's co-conspirators, aiders and abetters were, and where their places of operation were to transport controlled substances about an area. Experience has shown that



controlled substance manufacturers and distributors do not keep records of their controlled substance actions. It is the experienced belief of Special Agents of Region VI that additional surveillances of JACKSON's and BLAIR's and his operation, if continued on a regular basis, will jeopardize the outcome of the investigation, and will do little to reveal the manufacture and distribution network. JACKSON and BLAIR are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units. Special Agent Smith has been unable to move any further vertically or horizontally in the JACKSON/BLAIR operation because of JACKSON's and BLAIR's extreme caution. S-1 does not personally know anymore facts concerning the JACKSON/BLAIR operation.

20. For the reasons set out hereinabove, all normal avenues of investigation are closed, and it is my belief that the only reasonable way to develop the necessary evidence to discover the other persons involved in the JACKSON/BLAIR manufacture and distribution of controlled substances network, and their locations and schemes of operation, is to intercept wire communications from the telephone utilized by Eddie JACKSON and George BLAIR located in the premises at 19315 Hubbell, Detroit, Michigan, and carrying telephone number 313-864-4854, which has been, is being, and is about to be used by Eddie

> JACKSON, George BLAIR and others as yet unknown, in connection with the commission of the above-dsscribed offenses.

(App., infra, pp. 52a-54a).

In testing the sufficiency of § 2518(1)(c) statements, the Sixth Circuit has noted that:

> While the prior experience of investigative officers is indeed relevant in determining whether other investigative procedures are unlikely to succeed if tried, a purely conclusory affidavit unrelated to the instant case and not showing any factual relations to the circumstances at hand, would be, in our view, an inadequate compliance with the statute.

United States v. Landmesser, 553 F.2d 17, 20 (6th Cir. 1977), cert. denied, 434 U.S. 855.

Similarly, the Ninth Circuit, harmonizing several cases on this issue, has described the standard in the following terms:

> An affidavit composed solely of conclusions unsupported by particular facts gives not basis for a determination of compliance with section 2518 (1)(c) . . . .
>
> Any such showing [that normal investigative techniques reasonably appear unlikely to succeed if tried or to be too dangerous] requires setting forth



> an adequate factual history of the investigation and a description of the criminal enterprise sufficient to enable the district judge to determine, independently of an agent's assertions with respect to his or other agents' experiences, that ordinary investigative techniques very likely will not succeed or that their use will imperil life or in some other specific way be too dangerous. As previously indicated, an affidavit containing an unsupported assertion that general police experience indicates that ordinary investigative techniques "reasonably appear unlikely to succeed if tried or to be too dangerous" will not suffice.
> . . .
>
> . . . The district judge, not the agents, must determine whether the command of Congress has been obeyed.

United States v. Spagnuolo, 549 F.2d 705, 710-711 (9th Cir. 1977) (emphasis added). See generally, Note, Electronic Surveillance, Title III, And The Requirement of Necessity, supra.

Setting to one side the agents' opinions and beliefs, the only factual averments in the Garibotto affidavit which lent support to the conclusion that normal investigative procedures reasonably appeared unlikely to succeed were the following:

(1) "JACKSON and BLAIR are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units." (¶ 19).

(2) "Special Agent Smith has been unable to move any further vertically or horizontally in the JACKSON/BLAIR operation because of JACKSON's and BLAIR's extreme caution." (¶ 19).

(3) "S-1 does not personally know anymore facts concerning the JACKSON/BLAIR operation." (¶ 19).

In addition, there were the conclusory, but nonetheless significant statements that:

(4) "[A]ll normal avenues of investigation are closed. . . ." (¶ 20).

(5) "[T]he only reasonable way to develop the necessary evidence to discover the other persons involved in the JACKSON/BLAIR manufacture and distribution of controlled substances network, and their locations and schemes of operations, is to intercept wire communications from the telephone utilized by Eddie JACKSON and George BLAIR located in the premises at 19315 Hubbell, Detroit, Michigan. . . ." (¶ 20).

Assuming that these statements, when considered along with the remainder of the affidavit, are facially sufficient to satisfy § 2518(1)(c) and to support the required judicial determination under



§ 2518(3)(c), the issue raised in petitioner's motion to vacate was whether, in light of additional facts concerning normal investigative procedures disclosed for the first time at trial, he is entitled to an opportunity to impeach the Garibotto affidavit and attempt to establish, at an evidentiary hearing: (a) that one or more of the above statements were knowingly or intentionally false or made with reckless disregard for the truth; (b) that excluding any such false or reckless statements, the affidavit is insufficient to satisfy § 2518(1)(c); and (c) that by virtue of such false and misleading statements and the omission of material facts regarding the results and progress of normal investigative procedures, the affidavit failed to satisfy the "full and complete statement" requirement of § 2518(1)(c).

Trial Disclosures of the Government Informant

During petitioner's trial, the government's informant, Roosevelt Nabors (identified in the Garibotto affidavit as "S-1"), testified that between the period of the first and second undercover narcotics purchases described in the Garibotto affidavit (i.e., October 22, 1971 and November 4, 1971), George Blair offered him the

opportunity to become a "lieutenant" in the so-called "Jackson/Blair" narcotics organization which was the subject of the government's investigation. When Nabors informed Agent Garibotto of this offer, Garibotto told him not to accept it.

Thereafter, "three of four days after the second buy" (i.e., November 7 or 8, 1971), Nabors went to the Hubbell Street house that was the alleged headquarters of the narcotics organization to attend a "lieutenants' meeting" of the leadership of the organization. After he arrived at the house Nabors was asked by George Blair whether he had decided to accept the offer of a lieutenant's position. Consistent with the instructions of Agent Garibotto, Nabors then told Blair he did not wish to accept the offer.

Because of this refusal, Nabors was asked by Blair to leave the premises, and he did not attend the meeting. However, while he was still in the Hubbell Street house on this occasion, Nabors saw, in addition to George Blair: petitioner Eddie Jackson, Joseph Weaver, Courtney Brown, Herbert Bell, Willie Kilpatrick and "several other people" whose names he did not know. Each of the



above-named individuals was eventually indicted and convicted as a major figure in the narcotics conspiracy.[5/]

Renewal of Suppression Motion

Based upon the above testimony of government informant Nabors, petitioner renewed a motion to suppress the wiretap evidence on the ground that the § 2518(1)(c) allegations of the Garibotto affidavit were false and misleading. The district court denied the motion without hearing, stating initially that even if Nabors had further infiltrated the organization it would be unlikely that he could learn its full extent, and that because of Nabors' prior criminal record, his reliability both during the investigation and as a witness at trial was marginal at best.[6/] The court concluded:

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5/ The transcript of the above-described portion of Roosevelt Nabors' trial testimony is set forth at A. 79-85.

6/ Neither of these considerations detract from petitioner's contention that the Garibotto affidavit was materially false and misleading with respect to its § 2518(1)(c) allegations.

Regardless of how effective or ineffective it may have been, the fact that the opportunity for further infiltration by Nabors existed cannot be reconciled with Garibotto's statements that there was an inability "to move any further vertically or horizontally in the JACKSON/BLAIR operation", and that "all normal

[cont'd following page]

6/[cont'd]avenues of investigation are closed". In addition, this was highly relevant information concerning the progress of normal investigative procedures which should not have been withheld from the issuing judge. For it was for Judge Kennedy (the issuing judge), not Agent Garibotto, to ultimately decide whether normal investigative procedures reasonably appeared unlikely to succeed. The case of United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975), relied upon by the court in its decision, involved a wiretap obtained by state officials who were unaware that an informant was cooperating with the federal government. 489 F.2d at 565. Thus there was no issue of falsity or deliberate withholding of relevant information from the wiretap application as in the present case.

With regard to Nabors' "marginal reliability," paragraph 6 of the Garibotto affidavit painted a totally different picture:

> 6. A confidential informant of the Bureau of Narcotics and Dangerous Drugs hereinafter identified as S-1, has provided consistently reliable and valuable information in the past six months which has been corroborated by independent investigation and through other sources of information. Information for S-1 has been the basis for eight separate investigations completed except for arrest and aprehension [sic] involving 15 large-scale narcotic defendants. (App., infra, p. 42a).

It is fundamental that a reviewing court must examine the sufficiency of a search warrant affidavit solely on the basis of the facts contained therein, and may not employ hindsight evaluation based upon additional information not presented to the issuing judge. See, e.g., Whiteley v. Warden, 401 U.S. 560, 564-565 (1971). Thus for purposes of the government's wiretap application, Nabors was "reliable and valuable." That he may not have actually been so is only further evidence of the false and misleading nature of the Garibotto affidavit.



> More importantly, however, this Court cannot properly review the propriety of Judge Kennedy's findings in the two wiretap interception orders unless the averments made in the affidavits in support of the applications were in some way tainted. A wire interception order issued under 18 U.S.C. 2518, like an ordinary search warrant, cannot normally be challenged if it is facially valid. Here the only additional fact offered is that an informant might have been able to infiltrate the so-called Jackson Organization. We do not believe this evidence is sufficient to permit a reopening of Judge Kennedy's finding that normal investigative procedures appear to be unlikely to succeed.

(App., infra, p. 37a)

This refusal to allow impeachment of the Garibotto affidavit is clearly inconsistent with this Court's decision in Franks v. Delaware, supra, 438 U.S. 154 (1978).

The trial testimony of Roosevelt Nabors (A. 79-85), clearly provides the preliminary showing of material falsity to warrant a hearing under the standard announced in Franks. Two of the three factual statements in the Garibotto affidavit essential to the § 2518(3)(c) finding, and both of the conclusions therein (see p. 16, supra), are totally inconsistent and irreconcilable with the actual facts as disclosed at trial. Specifically:

| Garibotto Affidavit | Actual (Undisclosed) Facts |
|---|---|
| "Special Agent Smith has been unable to move further vertically or horizontally in the JACKSON/BLAIR operation because of JACKSON's and BLAIR's extreme caution." (¶ 19). | By virtue of the opportunity that was presented for the government's informant to become a lieutenant, the government was clearly <u>able</u> to move further vertically and horizontally in the operation. Jackson and Blair exhibited an extreme lack of caution in inviting Nabors to a "lieutenant's meeting" and offering him a high position in the organization. |
| "S-1 does not personally know anymore facts concerning the JACKSON/BLAIR operation." (¶ 19). | In addition to the facts set forth in the Garibotto affidavit (which stated that Jackson and Blair were the <u>only</u> known members of the conspiracy) Nabors "personally knew" that Joseph Weaver, Courtney Brown, Herbert Bell and Willie Kilpatrick were members of the conspiracy, having seen them at the Hubbell Street house on the day of the lieutenant's meeting. |
| "[A]ll normal avenues of investigation are closed...." (¶ 20). | By taking advantage of the unique opportunity for further infiltration of the organization that was presented by the offer of a "lieutenantship" to Nabors, extremely valuable and worthwhile avenues of investigation obviously remained <u>open</u> to the government. |



| Garibotto Affidavit | Actual (Undisclosed) Facts |
|---|---|
| "[T]he only reasonable way to develop the necessary evidence to discover the other persons involved in the JACKSON/BLAIR manufacturing and distribution of controlled substances network, and their locations and schemes of operation, is to intercept wire communications from the telephone utilized by Eddie JACKSON and George BLAIR located on the premises at 19315 Hubbell, Detroit, Michigan . . . ." (¶ 20). | By merely having Nabors attend the lieutenants' meeting to which he had been invited the government would have discovered the other principal persons involved in the conspiracy. Furthermore, their "locations and schemes of operation" would much more likely have been discussed at this secret meeting (during which Nabors could have been fitted with a transmitter or recording device) than on a telephone. |

It is also to be emphasized that § 2518(1)(c), which expressly requires a "full and complete" statement concerning other (non-wiretap) investigative procedures, imposes an obligation of <u>completeness</u> upon the government in addition to the requirement of truthfulness present in an ordinary search warrant situation. Completeness is particularly important because, as one court observed, § 2518(1)(c) requires the government "to prove a negative." <u>United States v. Steinberg</u>, 525 F.2d 1126, 1130 (2d Cir. 1975). It follows that this statutory requirement would be rendered meaningless if the government were permitted to deliberately or recklessly withhold

information concerning actually or potentially successful normal investigative procedures.

Thus, material omissions from wiretap applications--such as the failure to mention the unique opportunity for further infiltration by the government's "consistently reliable" and available to testify[7/] informant in the present case--must be deemed fatal defects under § 2518 (1)(c), even where an application is otherwise facially sufficient.

For the above reasons, petitioner should have been granted a full evidentiary hearing on the issue of falsity and incompleteness of the affidavit submitted by the government in support of its application for a wiretap.

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7/ There was no indication in the Garibotto affidavit that "S-1" was not willing to testify at trial. In fact, Nabors did testify both before the grand jury and at petitioner's trial. This has frequently been cited as an important consideration under § 2518(1)(c) and (3)(c). See, e.g., United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976) (informants unwilling to testify); United States v. Schwartz, 535 F.2d 160 (2d Cir. 1976) (informant not taken into confidence of conspirators and unwilling to testify); United States v. Vento, 535 F.2d 838 (3rd Cir. 1976) (informants unwilling to testify); United States v. Bobo, 477 F.2d 974 (4th Cir. 1973) (informants refused to testify); United States v. Anderson, 542 F.2d 432 (7th Cir. 1976) (informants would not testify).



## II.

## THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE ADMISSIBILITY OF EVIDENCE SEIZED AS A RESULT OF WARRANTLESS ENTRY INTO A PRIVATE DWELLING FOR THE PURPOSE OF ARRESTING THE OCCUPANTS.

Petitioner was arrested at approximately 10:00 P.M. on December 15, 1971, inside a private house on Hubbell Street, in Detroit. The entry and arrest is best described as a "raid" by approximately 30 law enforcement officers (federal narcotics agents accompanied by state and local police officers). Entry was forcible, and the officers had neither an arrest nor search warrant.

In addition to arresting petitioner, who was asleep at the time of the forcible entry, and other occupants of the house, the agents seized the premises and the contents thereof. This seizure included a quantity of narcotics, allegedly in plain view at the time of the arrest, which subsequently formed the basis of counts 12, 13, 14, 15 and 16 of the indictment. This narcotics was received in evidence at petitioner's trial.

While this warrantless entry, arrest and seizure was taking place, the officer who ordered it to begin, Agent Ronald Garibotto, was in the process of obtaining a search warrant for the premises. A matter of minutes later, the warrant was issued by United States District Judge Cornelia Kennedy. (App., infra, pp. 23a-28a).

Prior to trial petitioner moved to suppress the evidence seized at the Hubbell Street house on the ground that the federal agents deliberately delayed arresting petitioner until he was in the house so that they could thereby search the premises without a warrant. This contention is supported by Agent Garibotto's own explanation of why he ordered the warrantless entry and arrest when he did: "We were just concerned that the evidence that was on hand at Hubbell would be distributed to the streets and would not be seized." (App., infra, p. 26a). Nevertheless, the court of appeals, on direct appeal of petitioner's conviction, held that the warrantless arrest was made as soon as probable cause was established and not as a pretext for a warrantless search. (Id., p. 27a).

The issue raised by petitioner in his motion to vacate sentence, and in this petition, is the lawfulness of the warrantless entry into the Hubbell Street house (assuming that the entry was made in order to effect the arrests of the occupants, as held by the court of appeals). This issue--whether entry into a private dwelling for the purpose of making a warrantless arrest of the occupants is violative of the Fourth Amendment--[8]

[8]/See, e.g., United States v. Reed, 572 F.2d 412 (2d Cir. 1978); United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).



was not addressed by the court of appeals on direct appeal, and has yet to be definitively determined by this Court.[9]

If the warrantless entry into the premises and arrest of petitioner were unlawful, then it is clear that the resultant seizure of evidence in the premises was also unlawful. The fact that the agents subsequently obtained and executed a search warrant for the premises, pursuant to which the same evidence was "re-seized", obviously would not remove the initial taint. Otherwise, there would be no deterrent for the initial unlawful entry.

Warrantless police entry into private premises, such as occurred in this case, is a common practice of law enforcement agencies. It raises important constitutional problems that merit review by this Court.

[9]/The issue is presently before the Court in Payton v. New York, No. 78-5420, and Riddick v. New York, No. 78-5421, argued March 26, 1979.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the Sixth Circuit.

Respectfully submitted,

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July 1979

# APPENDIX

No. 78-5469

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT



EDDIE JACKSON,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

O R D E R

Before: LIVELY and MERRITT, Circuit Judges; CECIL, Senior Circuit Judge.

Petitioner appeals from the District Court's denial of habeas corpus relief pursuant to 28 U.S.C. § 2255 (1976). Petitioner was convicted of several drug offenses in 1972; the convictions were affirmed by this Court, United States v. Woods, 544 F.2d 242 (6th Cir. 1976), and the Supreme Court denied certiorari, 431 U.S. 954 (1977). On collateral attack, the defendant seeks to overturn his convictions on many of the same grounds raised on direct appeal. Specifically he contends (1) that Government statements in the wiretap application were false and misleading; (2) that the Government seized evidence in violation of the fourth amendment; and (3) that the evidence adduced at trial was insufficient. Defendant also challenges as multiplicitous sentences imposed pursuant to several counts of the indictment.

Regarding defendant's first three arguments, we believe this Court addressed these issues fully on direct appeal, and we see no reason to disturb our earlier ruling in United

States v. Woods, supra. Defendant argues that Franks v. Delaware, 46 U.S.L.W. 4869 (June 26, 1978), entitles him to a hearing regarding his allegations of Government misstatements in its application for a wiretap authorization. We disagree. Franks requires the defendant to make "a substantial preliminary showing" that the alleged misstatements are material and genuine. 46 U.S.L.W. at 4870. In our earlier opinion on direct appeal, we examined defendant's claim and concluded that, even if the Government had made the misstatements, as defendant claims, this would not render the affidavit insufficient as a matter of law. 544 F.2d at 257. Our procedure in Woods anticipated the approach set out in Franks whereby a search warrant based on false statements is void only if, after "the affidavit's false material is set to one side, the affidavit's remaining content is insufficient." 46 U.S.L.W. at 4870. Defendant, therefore, is not entitled to a hearing.

Defendant also seeks to vacate the sentences imposed pursuant to several counts of the indictment. He was convicted on Counts 6 and 7 of distributing heroin, 21 U.S.C. § 841 (1976), on two separate occasions on December 15, 1971. He also was convicted on Counts 10 and 11 of aiding and abetting, 18 U.S.C. § 2 (1976), the persons to whom he sold the heroin of possessing the drugs with intent to distribute them to other persons. Defendant was given separate sentences for both counts of actual distribution, Counts 6 and 7, and for both counts of





aiding and abetting the possession of heroin with intent to distribute, Counts 10 and 11. This was improper. In each transaction, defendant's culpable behavior consisted of the sale of heroin to others with the intent that the buyers would distribute it further. In this respect we believe the reasoning of United States v. Stevens, 521 F.2d 334 (6th Cir. 1975) and United States v. King, 521 F.2d 356 (6th Cir. 1975), is controlling. In these two cases, the defendants were convicted of possessing heroin with intent to distribute it and of actual distribution. We held that where "the single act of sale of heroin . . . formed the entire basis for [defendant's] conviction of both counts," only a single sentence could be imposed. 521 F.2d at 326-27.

In the instant case, the defendant was sentenced for both distributing the heroin and for aiding and abetting the buyers by virtue of the fact that he sold it to them. Since the convictions on each count were based on defendant's single act of selling heroin, he cannot be made to serve two sentences. Therefore, on remand the District Court must vacate one of the sentences imposed under Counts 6 and 10 and one of the sentences imposed under Counts 7 and 11.

Defendant also challenges as multiplicitous the separate sentences imposed under Counts 12-16 of the indictment for possession of heroin with intent to distribute it.

21 U.S.C. § 841 (1976). The government concedes multiplicity to the extent that all the narcotics forming the basis of these counts were seized simultaneously. United States v. Williams, 480 F.2d 1204, 1205 (6th Cir. 1973). However, the Government argues, correctly, that because different controlled substances, namely heroin and cocaine, were discovered, separate sentences are permissible to the extent that one sentence is for possession of heroin with intent to distribute it and another is for possession of cocaine with intent to distribute it. Therefore, on remand the District Court should vacate the separate sentences imposed under Counts 12-16 of the indictment. Only a single sentence may be imposed on Counts 12, 14 and 15 under which defendant was convicted of the offense involving cocaine. Similarly, only a single sentence may be imposed on Counts 13 and 16, under which defendant was convicted of the offense involving heroin.

Affirmed in part, reversed and remanded in part.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDDIE JACKSON,

Petitioner,

v. DOCKET NO: 8-71966

UNITED STATES OF AMERICA,

Respondent.

_____/

MEMORANDUM OPINION

Petitioner moves (28 U.S.C. 2255) for an order vacating the judgments of conviction and sentences imposed upon him on October 17, 1974, for 14 violations of controlled substance laws. He recites the fact that his convictions and sentences were appealed and affirmed, but he makes no further reference to the extensive opinion of the United States Court of Appeals for the Sixth Circuit which considered and disposed of every issue raised in his petition. United States v. Woods, 544 F.2d 242 (6th Cir. 1976). And, with one exception, he fails to advance any reason why this court is not bound by the determinations of the court of appeals. For the reasons given below, the petition is denied.

I.

Although traditional notions of res judicata do not apply in habeas corpus or 2255 proceedings, a court can refuse to retry issues fully and finally litigated on direct appeal. Taylor v. United States, 505 F.2d 955 (5th Cir. 1975). The issues presented are identical to those rejected by the court of appeals, and that determination requires denial of relief here as to all issues except one. Popeko v. United States, 513 F.2d 771 (5th Cir. 1975). The question of whether the relevant law with regard to search warrant affidavits has changed since petitioner's appeal was rejected will be considered infra.

In the absence of a change in the relevant law or a showing of manifest injustice, this court cannot entertain a petition which merely reasserts the same issues raised on appeal. Polizzi v. United States, 550 F.2d 1133 (9th Cir. 1976). This is really an application of principles and analogous to the doctrine of "the law of the case" with certain safeguards required by the criminal law context. A lower court is under a duty to follow what has been decided by a higher court at an earlier stage of the case as all matters decided expressly or by necessary implication. City of Cleveland v.



Federal Power Commission, 561 F.2d 344 (D.C. Cir. 1977); Popeko, supra. See also, 1B Moore's FEDERAL PRACTICE ¶ 0.404 [10] (2d ed. 1974).

I have examined the petition and compared it with the opinion of the court of appeals in Woods, supra, and find no new issues raised. Consequently, I decline to reopen any issue in this case with the exception of the issue as to which petitioner claims a change in the relevant law.

II.

Without expressly stating it, petitioner raises a claim under Davis v. United States, 417 U.S. 333 (1974), that the relevant law with regard to attacks on search warrant affidavits has changed since his appeal was rejected. If such an intervening change has occurred, petitioner is entitled to relitigate this issue even though it was decided on direct appeal. Davis, supra; Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977).

Petitioner claims that the decision of the United States Supreme Court in Franks v. Delaware, No. 77-5176 decided June 26, 1978, 23 Cr. L. Rpts. 3179, entitles him to an evidentiary hearing at which he should be allowed to attack allegedly false and misleading statements in the affidavit supporting the wiretap search warrant. He claims that at such a hearing he can show that the allegations of the the [sic] affidavit that purport to give

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous" 18 U.S.C. 2518 (1) (c)

were false and misleading and require suppression of all evidence produced by the wiretap.

The court of appeals considered these identical issues based on the same claims and evidence presented here and concluded:

> We hold that the affidavit... was a satisfactory statement of the investigative steps taken to date and that it affords a sufficient reason why normal investigative procedures "appear to be unlikely to succeed." Woods, supra at 257.

In Franks the Supreme Court dealt with a claim that the allegations of probable cause in a state court search warrant affidavit were false. The Court stated:

> [W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard



> is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. Slip Opinion p. 1.

The Supreme Court's holding in Franks does not apply to petitioner's attempt to attack the allegations concerning other investigative procedures that had been tried or appeared unlikely to succeed. The Franks holding goes to the issue of probable cause, a constitutional issue. Petitioner is challenging the satisfaction of the requirements of a statute dealing with alternate methods of investigation. There is no question but that the affidavit established probable cause, and the procedures set out in Franks do not apply.

The court of appeals had before it all of the evidence and arguments that are before me now, and it decided that the requirements of 18 U.S.C. 2518 (1) (c) were satisfied. Because the change of law announced in Franks is not applicable to petitioner's case he is not entitled to an evidentiary hearing to relitigate the question decided on direct appeal.

Accordingly, the petition for vacation of judgment and sentence is DENIED.

/s/ John Feikens
JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

DATE: SEPTEMBER 5, 1978,
Detroit, Michigan



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDDIE JACKSON,

Petitioner,

v. DOCKET NO: 8-71966

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER

At a session of said Court held in the Federal Building, City of Detroit, Michigan, on this 5th day of SEPTEMBER, 1978

PRESENT: HONORABLE JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

On filing the memorandum opinion dated this same day, and for the reasons contained therein,

IT IS ORDERED that petitioner's motion to vacate sentence, filed August 7, 1978, be and it is hereby DENIED.

/s/ John Feikens
UNITED STATES DISTRICT JUDGE

EXCERPT OF OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 74-2337-53

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

CARA WOODS, JR., WILLIE LEE KILPATRICK, JOSEPH LEON WEAVER, JAMES REGINALD WEAVER, EDDIE JACKSON, COURTNEY BROWN, HERBERT BELL, RONALD GARRETT, SAMUEL HORNE, ALPHONZO JONES, FAIRH LEE RIGGS, CHARLES RUDOLPH, LATICIA BURNS, MAURICE THOMPSON, LEO HURT, GEORGE BLAIR, CHARLES CAVANAUGH,
*Defendants-Appellants.*

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

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Decided and Filed October 8, 1976.

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Before: CELEBREZZE, McCREE, and MILLER,* Circuit Judges.

McCREE, Circuit Judge.

* * * * * *

* The Honorable William E. Miller died on April 12, 1976 and did not participate in this opinion.



## III. DID THE DISTRICT COURT ERR IN ADMITTING CHALLENGED EVIDENCE?

Appellants also seek to overturn their convictions on the basis of several rulings by the district court admitting challenged evidence. They contend that the wiretap evidence that figured so prominently in the prosecution's case was inadmissible, first because the government's application was not properly authorized, and also because the application did not meet several statutory requirements. Appellants seek the suppression of the evidence seized at the Hubbell Street house, and from appellants Jones, Hurt, and Woods at the time of their arrests, on Fourth Amendment grounds. Appellants contend that voice exemplars that they were required to give were inadmissible on both Fourth and Fifth Amendment grounds. And finally, they contend that the testimony of Agent Garibotto identifying the voices on the tapes was inadmissible because it was the fruit of informal "aural showups" which violated appellants' Fourth, Fifth, and Sixth Amendment rights.

### A. Wiretap Evidence.

The intercepted communications were critical items of proof in the government's case, and appellants contend that the district court erred in refusing to suppress the evidence seized by

the interception. They challenge the validity of the authorization for the government's application for a wiretap order.[10] They also argue that the application did not demonstrate that normal investigative procedures would have been inadequate, nor did it afford the district judge probable cause to believe that the telephone to be tapped was being used or was about to be used for one of the offenses specified in the wiretap statute.

**1. The Authorization for the Application for the Wiretap Order.**

Appellants argue that the wiretap evidence should have been suppressed because the government's application for the interception order lacked the authorization required by the statute. 18 U.S.C. § 2516(1) provides that:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications. . . .

In this case, the written application and the application for an extension stated that Attorney General Mitchell had specially designated *Acting* Assistant Attorney General Henry Peterson to authorize the application to the federal court, and Peterson's letter was attached.

After their indictment, appellants moved to suppress the wiretap evidence on the ground that an *acting* assistant attorney general had no authority to authorize wiretaps pursuant to § 2516. Appellants argue that the applications were insufficient on their face. Section 2518(10)(ii) provides that the contents of intercepted communications may be suppressed

[10] Appellants' challenge applies both to the original application and to the application for the extension. Our discussion applies to both as well.



on the ground that "the order of authorization or approval under which it was intercepted is insufficient on its face."

In *United States* v. *Vigi*, 515 F.2d 290 (6th Cir.), *cert. denied*, 432 U.S. 912 (1975), our court considered this argument and held that it was unnecessary to determine whether an *acting* assistant attorney general who signed the letter authorizing the application could give effective approval under § 2516, because the Attorney General himself had actually approved the application. *Accord, United States* v. *Swann*, 526 F.2d 147 (9th Cir. 1975); *United States* v. *Acon*, 513 F.2d 513 (3d Cir. 1975); *United States* v. *Robertson*, 504 F.2d 289 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975). The same situation is present in this case. The district court found that Peterson had submitted the papers supporting the request for authorization to Attorney General Mitchell, and that Mitchell himself approved the application. The government submitted the affidavit of Sol Lindenbaum who stated that the Attorney General had approved the request for authorization to apply for wiretap orders. Attached to this affidavit were copies of a memorandum from Mitchell to Peterson. In his deposition Lindenbaum identified the handwritten initials on the memos as Mitchell's. Judge Kennedy, who issued the wiretap orders, was told that Mitchell had approved the application. Appellants also contend, however, that Attorney General Mitchell's internal memoranda were ineffective because 28 C.F.R. § 0.180 required the designation of formal orders. Appellants contend that this section is applicable by its own terms to all documents relating to "the assignment . . . or delegations of authority, functions, or duties by the Attorney General." These documents are to be designated as formal "orders" to be issued by the Attorney General in a numbered series. This section is not applicable to delegations of the special authority over applications for interception orders, or to the Attorney General's personal approval of an application for an interception order. Other courts have found even verbal approval by the Attorney General to be

sufficient. *United States* v. *Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

Appellants also contend that the affidavit in support of the application for the wiretap failed to make the averments required by 18 U.S.C. § 2518(1)(c). Section 2518(1)(c) requires that an application for an electronic surveillance order contain a "complete statement as to whether or not other investigative procedures have been tried and failed or why they appear to be unlikely to succeed if tried or to be too dangerous. . . ." We hold that the affidavit of Agent Garibotto was a satisfactory statement of the investigative steps taken to date, and that it affords a sufficient reason why normal investigative procedures "appear to be unlikely to succeed."[11]

[11] Agent Garibotto's affidavit stated in part:

19. Normal investigative procedures have not succeeded in establishing the full extent of the activities of Eddie JACKSON and George BLAIR relating to their purchase or sale of controlled substances, nor has Eddie JACKSON's and George BLAIR's source of supply been identified or established. Based on my knowledge and experience as a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs, and the experience of Supervisory Agents and other Special Agents of the Bureau of Narcotics and Dangerous Drugs, normal investigative procedures reasonably appear to be unlikely to succeed in establishing the identities of Eddie JACKSON's and George BLAIR's co-conspirators, aiders and abettors, their places of operation for their transportation of controlled substances to the Detroit, Michigan area and for their manufacture and distribution of controlled substances within the Detroit, Michigan area, and their times, places, schemes, and manners for selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances. My experience and the experience of other Federal Agents has shown that narcotics (controlled substance) raids and searches have not, in the past, resulted in obtaining evidence of who the raided violator's co-conspirators, aiders and abettors were, and where their places of operation were to transport controlled substances into an area or manufacture or distribute controlled substances about an area. Experience has shown that controlled substance manufacturers and distributors do not keep records of their controlled substance actions. It is the experienced belief of Special Agents of Region VI that additional surveillances of JACKSON's and BLAIR's and his operation, if continued on a regular basis, will jeopardize the outcome of the investigation, and will do little to reveal the manufacture and distribution network. JACKSON and BLAIR are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units. Special Agent Smith has been unable to move any further vertically or horizontally in the JACKSON/BLAIR operation because of JACKSON's and BLAIR's extreme caution. S-1 does not personally know anymore facts concerning the JACKSON/BLAIR operation.

20. For the reasons set out hereinabove, all normal avenues of investigation are closed, and it is my belief that the only reasonable way to develop the necessary evidence to discover the other persons involved in the JACKSON/BLAIR manufacture and distribution of controlled substances network, and their locations and schemes of operation, is to intercept wire communications from the telephone utilized by Eddie JACKSON and George BLAIR located in the premises at 19315 Hubbell, Detroit, Michigan, and carrying telephone number 313-864-4854, which has been, is being, and is about to be used by Eddie JACKSON, George BLAIR and others as yet unknown, in connection with the commission of the above-described offenses.



However, appellants argue that the averments were false and misleading because a government informant, Roosevelt Nabors, had been asked to become a lieutenant in the organization, but had refused on the advice of government agents. This opportunity for infiltration, they argue, would have permitted the government to investigate the organization by normal procedures. The affidavit did not discuss the invitation for Nabors to become a lieutenant. The district judge rejected this argument because, even as a lieutenant, Nabors would have had difficulty in learning all the complex details of the widespread organization, and its aiders and abettors. Moreover, in view of Nabors' lengthy prior criminal record, the government would have had great difficulty in establishing criminal liability by his testimony alone.

We agree with the district court's analysis. The availability of an informant who was offered and declined an opportunity to penetrate deeper into a criminal organization under investigation did not render insufficient Garibotto's statements of the need for wiretaps to discover and prove the liability of the conspirators. *See United States* v. *Pacheco*, 489 F.2d 554, 564-565, *cert. denied*, 421 U.S. 909 (1975).

Appellants' final contention regarding the wire interception is that the affidavit submitted with the application for the wiretap order did not meet the requirement of 18 U.S.C. § 2518(3)(d) that it afford the district court "probable cause

for the belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of [an offense specified] . . . ." Appellants contend that the application failed to establish probable cause to believe that the telephone in the house on Hubbell Street was being, or was about to be, used to facilitate the distribution of narcotics.

The affidavit recited that on two separate occasions, on October 22 and November 4, a government informant, who consented to having government agents monitor his conversation, called the number registered to the Hubbell Street address and set up a sale at the Hubbell Street house, and the purchased substance was tested and found to be heroin. During the exchange, the agent observed the telephone ring a number of times. He saw appellants Blair and Brown answer the calls. Additionally, Garibotto averred that based upon his experience in narcotics investigations, a telephone was regularly used to negotiate the time, place, and manner of "selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances."

On review, we must view the affidavit in a common sense fashion, and we think that it afforded probable cause to believe that the telephone at the Hubbell Street address was being used to make the arrangements for a series of narcotics transactions. This is sufficient to satisfy the requirement of § 2518(3)(d).

**2. The Arrests of Appellants Jones, Hurt, and Woods.**

We next consider the legality of the arrests of appellants Jones, Hurt, and Woods as they left Hubbell Street on the night of December 15. Appellants argue that the government lacked probable cause to make these arrests, and that the evidence seized at the time of the arrests must be suppressed. Earlier in the evening of the night of the arrests,



the agents monitoring the Hubbell Street telephone tap overheard conversations indicating that an expected shipment of narcotics had arrived. Accordingly, a large number of government agents took up surveillance posts near the Hubbell Street house and arrested appellants as they left the structure.

The government intercepted a call from Joe Weaver to appellant Jones about 9 p.m. Weaver told Jones that "Courtney [Brown] wants to see you." Garibotto was informed of this call, and he instructed Agent Smelter that Jones was a close associate of Jackson, and that he should be arrested as he left Hubbell Street.

Agent Dockery testified that he actually arrested Jones. There was no evidence that Dockery knew that Garibotto had identified Jones as a close associate of Jackson's who should be arrested. Dockery testified that when he arrested Jones, he knew that the wire interception indicated that a large shipment of narcotics was concealed at 19315 Hubbell Street, that Weaver had called Jones and told him that Courtney wanted to see him, and that Jones was identified by another agent when he arrived at Hubbell Street. Dockery testified that based on their knowledge of the large quantity of narcotics hidden on the premises, he and the other agents had conferred and determined that anyone seen entering and then leaving 19315 Hubbell would be stopped and searched "on the probable cause that they would be carrying narcotics." He observed Jones' car pull up to the house, and saw its two passengers enter 19315 Hubbell. They departed about five minutes later. Dockery followed them for a short distance, then arrested them. A search revealed that Jones had concealed four cellophane bags containing about one pound of heroin each inside his shirt at the waistband. The evidence of the 1,924.5 grams of heroin was the basis for counts 6 and 10, distribution and possession without intent to distribute heroin.

Agents also intercepted a call from Blair to appellant Hurt on December 15. Blair stated that the heroin was on hand.

Hurt wanted a kilogram, and he was told that he would have to pay cash. Hurt asked the price, and Blair stated that he would call him back. Garibotto was informed of the call, and he stated that Hurt was a substantial customer, and if he came he should be arrested as he left.

Hurt was arrested by Agent Cigich, who testified that "supervisory agents" told him to maintain surveillance at Hubbell Street, and

> should any individual that had arrived at that address get back into their [sic] vehicles and depart, to apprehend and place under arrest the individual.

Hurt arrived and entered 19315 Hubbell. When he departed, Agent Cigich followed and arrested him some distance away. Cigich testified that he found a small packet of white powder "inside the car, lying on the floor next to the driver's front seat." The powder was tested and found to be .268 grams of heroin. Apparently Hurt was the driver and only person in the car at the time of the arrest. The heroin was offered into evidence in support of appellants' convictions on counts 7 and 11, possession and possession with intent to distribute .268 grams of heroin.

There was testimony that agents observed Woods arrive at 19315 Hubbell at about 9:40, and leave a few minutes later. He was arrested by Agent Goldenbaum. Goldenbaum testified that he had been informed by agents monitoring the wiretaps that a narcotics shipment had arrived at Hubbell Street and was being rapidly distributed. He was told to get into a radio car and take up a surveillance position. He learned that at about 9:30 two persons had been arrested leaving the premises, and were found to have suspected narcotics in their possession. At about 9:40, he was informed by radio that a 1969 Chrysler was parked in front of the Hubbell Street house, and he was told to follow it when it left and to arrest appellant Woods. A package containing 37.66 grams of cocaine and 137.5 grams of heroin was found in the pocket of his jacket.



Additionally agents seized $4,809 in cash and a pistol. This evidence was the basis of counts 8 and 9 charging distributing the heroin and cocaine, and supported the conspiracy charge.

The district court upheld each of these arrests. The court held that it was reasonable for the arresting officers to assume that the Jones who was identified arriving at Hubbell Street was the Jones who had called earlier and whom Garibotto had ordered arrested. The court held that although no one actually identified Hurt prior to his arrest, "the officers had enough facts to determine that the man they arrested was Leo Hurt, Jr., and *probably* he was violating federal narcotics statutes." Although there was no intercepted telephone call to Woods, the district court held that the agents had probable cause because they knew that the Hubbell Street house was being used as a distribution site for narcotics on the night of December 15. The court reasoned that it was extremely unlikely that a person would come to the distribution center on that night except for the purpose of illegal narcotics trafficking. Moreover, the agents knew that it was common practice in the narcotics trade to dispense a shipment quickly. Accordingly, when they saw Woods arrive and depart after only a few minutes – just as Jones and Hurt had done a few minutes earlier – they had probable cause to believe that Woods, too, would have narcotics in his possession when he left.

Neither Garibotto's knowledge about Jones and Hurt nor his orders for their arrest can be relied upon to provide probable cause for their arrests, because there was no evidence that any of his comments had been communicated to the agents on the scene who actually made or ordered their arrests.

The government contends that the information known to a superior officer may be imputed to the arresting officer, *citing* *United States* v. *Trabucco*, 424 F.2d 1311, 1315 (5th Cir. 1970), *cert. denied*, 399 U.S. 918 (1970), and that the collective knowledge of agents working as a team is to be considered together in determining probable cause. *E.g.*, *United States* v. *Caniesco*, 470 F.2d 1224, 1230 n. 7 (2d Cir. 1972);

*United States* v. *Stratton*, 453 F.2d 36 (8th Cir. 1972), *cert. denied*, 405 U.S. 1069 (1972). When a superior officer orders another officer to make an arrest, it is proper to consider the superior's knowledge in determining whether there was probable cause. Likewise, when a group of agents in close communication with one another determines that it is proper to arrest an individual, the knowledge of the group that made the decision may be considered in determining probable cause, not just the knowledge of the individual officer who physically effected the arrest. But here, in contrast, because there was no evidence that Garibotto's order to arrest either Jones or Hurt was the basis of their arrests, his knowledge cannot be considered in determining probable cause. On the other hand, we do mutually impute the knowledge of all the agents working together on the scene and in communication with each other. Therefore it was proper to consider not only the facts known to Agent Goldenbaum when he arrested Woods, but also the information known to the officers who saw Woods visit 19315 Hubbell and ordered Goldenbaum to follow and arrest him.

When Dockery arrested Jones, he knew that Jones had received a call from the Hubbell Street telephone that evening, that narcotics were believed to be concealed on the premises, and that the person he saw enter and leave the premises was known to another agent on the scene as Alphonzo Jones. Dockery testified that he had conferred with the other agents on the scene and determined that anyone who visited 19315 Hubbell Street was likely to be carrying narcotics when he left. The district court's discussion of Woods' arrest indicates that it determined that the agents on the scene knew that 19315 was being used as a narcotics distribution center that evening, and we assume that Dockery learned as much from his conference with the other agents.

These facts are sufficient to afford probable cause to believe that Jones had been trafficking in heroin. Of course if the



government had offered evidence that the agents on the scene were aware of Jones' close association with Jackson at the time of the arrest, this additional evidence would have strengthened the probable cause. Mere presence at a place where the government believes illegal drugs will be distributed will not provide probable cause for an arrest on narcotics charges. *See Sibron* v. *New York*, 392 U.S. 40 (1968). But here we think that the agent who made the arrest did have reason to believe that it was more likely than not that Jones was in possession of narcotics when he left 19315 Hubbell. 19315 was a story-and-one-half bungalow, and agents knew that it was used as a headquarters and distribution site for narcotics. They also knew that a large shipment of narcotics had arrived. Since Dockery had a conference with the other agents, and knew of the call to Jones, we think that it is legitimate to assume that he knew that the wiretap indicated that the shipment was to be distributed to callers *that evening*. In this circumstance, as the district court reasoned in connection with Woods, it was more likely than not that a visitor on the night of December 15 was there to pick up narcotics, especially when he had been called earlier that night from the Hubbell Street address. Accordingly, the arrest was lawful and the evidence seized from Jones was properly admitted.

In the case of appellant Hurt, the same reasoning applies. Agent Cigich testified that he made the arrest because of a general order by his supervisors to arrest anyone leaving 19315 Hubbell that evening. Although the government did not prove that the call from Blair to Hurt negotiating the sale of a kilogram had been communicated to Cigich or to the other agents on the scene, we assume that the supervisory agents who gave these orders knew of the anticipated distribution from the Hubbell Street house *that evening*. As in the case of appellant Jones, there was probable cause to arrest Hurt immediately after his brief visit to the house. The totality of the circumstances suggested

no reason for his presence other than to engage in narcotics traffic.

In the case of appellant Woods, moreover, the agents had more than simply the expectation that 19315 Hubbell was to serve as a distribution site that evening. They also knew that two other persons who had arrived shortly before Woods had been arrested and were found to have suspected narcotics in their possession. Additionally, as the district court noted, the agents knew that once a narcotics shipment arrives, it is distributed very quickly. In these circumstances, we agree with the district court that the facts known to the officers who ordered the arrest of Woods, and of which they had reasonably trustworthy information, " 'were sufficient to warrant a prudent man in the belief that [Woods] had committed or was committing an offense.' " *Adams* v. *Williams*, 407 U.S. 143, 148 (1972), *quoting Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

Accordingly, we hold that the evidence seized at the arrests of appellants Hurt, Jones, and Woods was legally seized, and was admissible to prove their guilt. Since we find that there was probable cause for the arrest of Cara Woods, the evidence seized at the time of the arrest was admissible, and we have no occasion to consider whether the statements he later made were independent of his arrest.

**B. The Evidence Seized from the Hubbell Street Premises.**

A large quantity of narcotics was seized from the house on Hubbell Street on December 15, shortly after the arrests of appellants Jackson, Brown, Blair, and Joseph and Reginald Weaver. Appellants contend that these arrests were purposely delayed until appellants were inside the Hubbell Street house, and that they were used as a pretext for making a search of the premises without a warrant.

The arrests were made at approximately 10 p.m. on December 15. According to the testimony at the suppression hearing, about 6 p.m. that evening, government agents who were



monitoring the Hubbell Street wiretaps informed Agent Garibotto that several calls suggested that a long awaited shipment of narcotics had arrived. Garibotto testified that he and government attorneys immediately began to prepare affidavits in support of a search warrant for Hubbell Street. Since these calls also indicated to Garibotto that buyers had arranged to come to Hubbell Street, he ordered the agents in the Hubbell Street vicinity to be alerted for the buyers' arrival. At approximately 9:45 Garibotto, who was on the way to the home of a district judge to present the affidavits, was notified of the arrests of Jones, Hurt, and Woods as they left Hubbell Street. He was also told that each of them was found to be in possession of narcotics when arrested. At that time Garibotto ordered the agents on the scene to arrest Jackson and the others found in the Hubbell Street house. At approximately 10 p.m. at the home of the district judge, when he was notified that the arrests had been made, and that suspected narcotics had been found in plain view, he added this information to the affidavit. The district judge issued a search warrant for the house on Hubbell Street, and a full search was made pursuant thereto. A large quantity of narcotics was found and was later introduced into evidence at appellants' trial.

Appellants contend that Garibotto purposely ordered the arrests to be made at the Hubbell Street house as a subterfuge to permit a search of the premises without a warrant. Garibotto denied that he delayed the arrests for that reason. Both appellants and the government rely upon Garibotto's statement of his purpose for ordering the arrests at that time. He testified:

> Well, the circumstances at the Hubbell address mandated that the arrest be made at that time. Our forces were diffused at the time. We knew there were a great number of customers heading to the Hubbell address to purchase heroin and cocaine. We made three arrests, there were three seizures. We knew that our forces were

> spread around the immediate vicinity. We were just concerned that the evidence that was on hand at Hubbell would be distributed to the streets and would not be seized.

The district court upheld the seizure of the challenged evidence on two grounds. First, it held that

> [d]espite substantial testimony about the arrests themselves at Hubbell, no persuasive facts were presented to support defendants' allegation that Jackson could have been arrested prior to his entering the house on Hubbell.

Additionally, the court held that even assuming that the agents had improperly delayed the arrests to gain entry into the house without a warrant, the search that was later conducted pursuant to a warrant was not tainted. The court reasoned that the district judge, who received lengthy affidavits prepared *before* the arrests (to which only one handwritten paragraph had been added *after* the arrests), had before her sufficient unchallenged facts to afford probable cause for a search. The improper addition could therefore be ignored.

Our court has repeatedly made it clear that:

> An arrest may not be used as a pretext or subterfuge for making a search of premises without a search warrant where ordinarily one would be required under the Fourth Amendment. If, in fact, the primary purpose of forcibly entering a person's home is to search for evidence with which to convict him of crime, the evidence so obtained is not admissible in court.

*United States* v. *Harris*, 321 F.2d 739, 741 (6th Cir. 1963), *quoted in United States* v. *Carriger*, No. 74-1901 (6th Cir. 1976, decided and filed, August 25, 1976) [Footnote omitted]. As Chief Judge Cecil stated in *Harris*,

> The real purpose of the agents must be determined from all of the facts and circumstances surrounding the arrest of the defendant and the search of his apartment. The court is not bound to accept the purpose as stated by the agents as controlling.



321 F.2d 741.

Appellants argue that probable cause to arrest Jackson, Brown, and Blair existed after the October 22 and November 4 sales to the undercover agent. Moreover, they emphasize that Jackson was under government surveillance before he arrived at Hubbell Street, but he was not arrested until *after* he was on the premises. They argue that Garibotto's statement quoted above admits that his purpose in ordering the arrests was to permit the warrantless search and seizure of narcotics.

Although the district court did not focus on the issue as stated in *Harris*, its determination that the defendants did not prove that Jackson could have been arrested sooner implies that the government did *not* make the arrests as a pretext for a warrantless search. The arrests were ordered as soon as the buyers who had called earlier left the premises, were arrested, and were found to be in possession of narcotics. Taken with the reports of the outgoing calls from Hubbell setting up additional sales, this firmly established that the narcotics shipment had arrived, and that the occupants of the house were distributing it rapidly. This knowledge afforded probable cause to arrest all the occupants of the house, not just Jackson. Moreover, we think that Garibotto's testimony indicates that there was real concern for preventing the unlawful distribution of a large shipment of narcotics to other purchasers, as well as a desire to effect the arrests while there was sufficient manpower available. The record does not indicate that the government was trying to avoid getting a warrant to search Hubbell Street. In fact, when Garibotto ordered the arrests he was on his way to the home of a district judge with detailed affidavits, and he added only a brief handwritten statement after he learned of the arrests. The district judge actually

issued a warrant within minutes of the entry and arrests. No search of the premises was made until the warrant was issued.

The facts and circumstances surrounding the arrests thus demonstrate that the government did not manipulate the arrests in order to avoid the Fourth Amendment warrant requirement, and we hold that the evidence seized from Hubbell Street was properly admitted.



EXCERPT OF
MEMORANDUM OPINION AND ORDER
DENYING MOTION TO SUPPRESS
WIRETAP EVIDENCE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL ACTION

vs. NO. 46597

EDDIE JACKSON, et al.,

Defendants.

_____/

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL ACTION

vs. NO. 46598

WILLIE LEE KILPATRICK, et al.,

Defendants.

_____/

MEMORANDUM OPINION AND ORDER

Defendants in the above captioned cases have moved to suppress all evidence

obtained from Wire Interception Orders No. 11-11-71-CK and No. 12-1-71-CK. . . .

* * *

Defendants also contend that the wire tap orders are defective because they do not contain a finding that:

> Normal investigative procedures have been tried and failed . . .

However, the applications, affidavits in support thereof, and the orders themselves contain an equally acceptable finding that:

> [N]ormal investigative procedures reasonably appear to be unlikely to succeed.

Such a finding satisfies the requirements for a wire tap order. 18 U.S.C. § 2518(3)(c). Likewise, the factual recitation in the affidavits in support of the applications fully support such a finding in fulfillment of 18 U.S.C. § 2518(1)(c).

* * *

For the reasons given the defendants' motion to suppress the evidence procured by wire tap orders in the above-captioned case is hereby ORDERED DENIED.

/s/ John Feikens
JOHN FEIKENS
United States District Judge

/s/ Philip Pratt
PHILIP PRATT
United States District Judge

Dated: June 16, 1972



EXCERPT OF
MEMORANDUM OPINION DENYING DEFENDANTS' MOTION FOR REHEARING RE: SUPPRESSION OF WIRETAP EVIDENCE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 46597

vs.

EDDIE JACKSON, et al.,

Defendants.

_____/

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 46598

vs.

WILL LEE KILPATRICK, et al.,

Defendants.

_____/

MEMORANDUM OPINION DENYING DEFENDANTS' MOTION FOR REHEARING RE: SUPPRESSION OF WIRETAP EVIDENCE

Defendants have moved for a rehearing

on their Motion to Suppress Wiretap Evidence. This Motion is denied; but the Court does, however, wish to amplify its reasoning expressed on some of the issues in the earlier opinion on this subject issued June 16, 1972.

* * *

Defendants next contend that the applications presented to Judge Kennedy on November 11, and December 1, 1971 were fatally defective because they did not allege that "normal investigative procedures have been tried and . . . reasonably appear unlikely to succeed." The relevant statutory section here is § 2518(3)(c), which reads as follows:

> "(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Although Congress might have more artfully drafted the subsection, the two words "if tried" at the end of the phrase "or reasonably appear to be unlikely to succeed if tried" clearly indicate that each of the three phrases in the subsection are to be construed alternatively. Thus, there are three permisible findings: (1) normal investigative procedures have been tried and have failed; (2) normal investigative procedures reasonably appear to be unlikely to succeed if tried; or (3) normal investigative procedures [appear] to be too dangerous. Judge Kennedy here found the second. The orders and applications are sufficient on their face and, therefore, withstand the exclusionary rule of § 2518(10)(a)(ii).

* * *



The other arguments presented by defendants were adequately discussed in the June 16, 1972 opinion and are without merit. Finally, since no allegations of facts contrary to those in the two original applications and supporting affidavits sworn to before Judge Kennedy have been made by defendants, no evidentiary hearing on the validity of the allegations made therein is appropriate.

Defendants' Motion for Rehearing on the Motion to Suppress Wiretap Evidence is, therefore, DENIED.

IT IS SO ORDERED.

/s/ Philip Pratt
PHILIP PRATT
United States District Judge

/s/ John Feikens
JOHN FEIKENS
United States District Judge

Dated: June 5, 1973.

EXCERPT OF
MEMORANDUM OPINION AND ORDER
CONCERNING TRIAL ISSUES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 46597

vs.

EDDIE JACKSON, et al.,

Defendants.

_____/

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 46598

vs.

WILLIE LEE KILPATRICK, et al.,

Defendants.

_____/

MEMORANDUM OPINION AND ORDER

These cases are currently before the Court for decision after a bench trial.



In this memorandum the legal issues which arose during and after trial will be discussed. Before proceeding to a discussion of those issues, however, a brief factual summary of these cases and the trial should be helpful.

* * *

I. Wire Interceptions

Throughout these proceedings defendants have challenged the lawfulness of wire interceptions made under the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S. C. § 2511 et seq.). Defendants now raise three additional arguments in seeking to suppress all evidence derived from these interceptions.

* * *

B.

Defendants further contend that the evidence produced at trial clearly indicated that electronic surveillance was not necessary in this case and that normal investigative procedures would have been satisfactory. This argument is founded upon 18 U.S.C. § 2518(3) which requires a showing that normal investigative procedures are inadequate before wire interception methods may be utilized.

At trial one of the defendants in Number 46598, Roosevelt Nabors, testified for the government. Defendants assert that Nabors could have infiltrated the organization allegedly formed by defendant Jackson and that a wiretap on Jackson's telephone at 19315 Hubbell Street was unnecessary.

In the previous opinions, we fully discussed this issue and held that there had been a sufficient showing in each application and supporting affidavit submitted to Judge Kennedy to support her finding that normal investigative procedures would reasonably appear to be unlikely to succeed. Absent a showing that the averments relied upon by Judge Kennedy in making this determination were knowingly false or made in bad faith, her finding is necessarily conclusive.

Defendants contend, however, that Nabors had an opportunity to become a lieutenant in "the Jackson organization." While this may well be true, it does not substantially detract from the averments of Special Agent Ronald S. Garibotto in his affidavits submitted to Judge Kennedy in support of the two wiretap applications. Narcotics distribution operations are extremely complex. Thus it would be unlikely that Nabors could learn the extent of the alleged conspiracy even if he could have, in fact, infiltrated the organization. Additionally, with his lengthy prior criminal record, Nabor's reliability, both during the investigation and as a witness at trial, was marginal at best.

In United States v. Pacheco, 489 F.2d 554 (1974), the Fifth Circuit, in a case similar to the case at bar, held that the availability of an informant is not sufficient to eliminate the need for a wiretap when the investigation involves a complex illicit operation.

> "In no realistic sense could it be said that Mrs. Matthews had information that would eliminate, or, in some instances, even lessen, the need for the Fox tap. Without the Fox tap, there would have been at least seven defendants who would not have appeared in the case at all, and the sole evidence as to several others would have been the uncorroborated testimony for an accomplice previously convicted of purjury[sic]. Finally, we note that the purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the judge of the difficulties involved in the use of conventional techniques."
>
> 489 F.2d at 565.



See also United States v. Bleau, 363 F. Supp. 438, 441 (D. Md. 1973), and United States v. Staino, 358 F.Supp. 852, 856-7 (E.D. Pa. 1973).

More importantly, however, this Court cannot properly review the propriety of Judge Kennedy's findings in the two wire interception orders unless the averments made in the affidavits in support of the applications were in some way tainted. A wire interception order issued under 18 U.S.C. § 2518, like an ordinary search warrant, cannot normally be challenged if it is facially valid. Here the only additional fact offered is that an informant might have been able to infiltrate the so-called Jackson Organization. We do not believe this evidence is sufficient to permit a re-opening of Judge Kennedy's finding that normal investigative procedures appear to be unlikely to succeed.

* * *

A number of other issues were raised during the course of the trial by defense counsel.[14/] Since, however, defendants have not presented any written arguments on these questions, they apparently do not wish to pursue them at this time. We have nevertheless considered each and believe them to be without merit.

JOHN FEIKENS
United States District Judge

PHILIP PRATT
United States District Judge

Dated: July _____, 1974.

Detroit, Michigan

14/ These issues include (1) dismissal after the government's opening statement; (2) the lawfulness of the arrest of defendants Kilpatrick, Reynolds and Riggs in New York; (3) demand for evidence seized from defendants Kilpatrick and Reynolds in New York, and (4) admissibility of evidence at trial relating to occurrence before the alleged beginning of the conspiracy.



## AFFIDAVIT OF RONALD S. GARIBOTTO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS | ) | No. A-11-11-71 CK |

## AFFIDAVIT

## IN SUPPORT OF APPLICATION

Ronald S. Garibotto, being duly sworn, states:

1. I am a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. I have been so employed for two and one-half years (2 1/2) and have been assigned to the Federal Bureau of Narcotics and Dangerous Drugs, Regional Office, Region VI, Detroit Michigan for two years. I am an "investigator or law enforcement officer.....of the United States" within the meaning of Section 2510(7) of Title 16, United States Code - that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for the offenses enumerated in Section 2516 of Title 18, United States Code.

2. This Affidavit seeks authorization to intercept wire communications for a twenty (20) day period concerning offenses involving violations of 21 U.S. C. 841(a)(1), 843(b), 844(a) and 846, which have been and are being committed by Eddie JACKSON, George BLAIR and others as yet unknown.

3. I have participated in the conduct of investigation of the offenses of Eddie JACKSON and George BLAIR. As a result of my personal participation in these investigations, of my knowledge of reports made to me by other Special Agents of the Federal Bureau of Narcotics and Dangerous Drugs and by officers and officials to the Detroit Police Department, in this matter and of my personal knowledge of the circumstances of these offenses involving the violations described in paragraph 2 above, I allege facts contained in the following numbered paragraphs to show that:

(a) there is probable cause to believe that Eddie JACKSON, George BLAIR and others as yet unknown have committed and are committing violations of Title 21, United States Code, Sections 841(a)(I), involving the knowing or intentional manufacture or distribution or the possession with intent to manufacture or distribute a controlled substance; 843(b), involving the knowing or intentional use of any communications facility in committing or in causing or facilitating the commission of violations of Sections 841(a)(I), 844 (a) and 846 of Title 21, United States Code; 844(a) involving unlawful possession of a controlled substance; and 846



involving a conspiracy to violate Sections 841(a)(I), 843(b) and 844(a) of Title 21, United States Code.

(b) there is probably cause to believe that telephone communications concerning the above-described offenses will be obtained through the interception of wire communications, authorization for which is herein applied. In particular, these wire communications to be intercepted will concern the dates, times, places, schemes and manners for selling, buying, possessing, concealing, delivering, distributing or paying for controlled substances when Eddie JACKSON and George BLAIR communicate with their co-conspirators, aiders and abetters, and their places of operation.

(c) normal investigative procedures reasonably appear to be unlikely to succeed.

(d) there is probable cause to believe that the telephone utilized by Eddie JACKSON and George BLAIR, located in the premises at 19315 Hubbell, Detroit, Michigan and carrying telephone number 313-864-4854 has been, is being and is about to be used by Eddie JACKSON, George BLAIR and others as yet unknown in connection with the commission of the above-described offenses.

4. Congressional findings and declarations to Title 11, Section 101 of Public Law 91-513, 84 Stat. 1242, 21 U.S. C. 801, the "Controlled Substance Act" of the Comprehensive Drug Abuse Prevention and Control Act of 1970 include subsections (2) through (7). These excerpted findings

are set out in full in paragraph number four of the Application and are incorporated by reference herein.

5. Based on my experience in criminal investigations concerning illegal controlled substances trade and the experience of other Special Agents in investigations concerning illegal controlled substance transactions, it has been determined that an illegal controlled substances manufacturer or distributor requires the use of a telephone facility to negotiate times, places, schemes and manners for selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances.

6. A confidential informant of the Bureau of Narcotics and Dangerous Drugs hereinafter identified as S-1, has provided consistently reliable and valuable information in the past six months which has been corroborated by independent investigation and through other sources of information. Information from S-1 has been the basis for eight separate investigations completed except for arrest and aprehension [sic] involving 15 large-scale narcotic defendants.

7. On October 22, 1971 S-1 placed a telephone call to telephone number 313-864-4854 in the presence of Bureau of Narcotics and Dangerous Drugs Special Agents Claude Smith and Richard Waber consenting to the Agents overhearing S-1's conversation with George BLAIR or Eddie JACKSON. The consensual overhearing was recorded and a portion of the transcript of that recording is as follows:



BLAIR: Hello.

S-1: How ya doin'?

BLAIR: Alright.

S-1: Did ya make it yet?

BLAIR: Huh?

S-1: Did ya make it yet?

BLAIR: Yeah, this is George.

S-1: What's happenin'?

BLAIR: Nothin' too much.

S-1: Hey, man, you the doctor.

BLAIR: Yeah, I been by your house, man.

S-1: My woman told me you was by, I was over by my man's, you know?

BLAIR: Yeah.

S-1: And a, we gettin' together on that thing.

BLAIR: Uh, huh.

S-1: So, listen, we got everything together, that thing, you know.

BLAIR: Oh.

S-1: For that 30?

BLAIR: Yeah.

S-1: That eighth.

BLAIR: Uh huh.

S-1: Uh huh, well, look here, now, what I'm gonna do, I'm gonna get right on in and get right on out.

BLAIR: Uh huh.

S-1: You know what I mean?

BLAIR: Uh huh.

S-1: Like, a lotta time been sayin', you know, they gonna take me out there, you know, to meet the man, you know?

BLAIR: Uh huh.

S-1: Tell me wait around the corner,

BLAIR: Uh huh, no (IA) I'll bring him here. I don't know whether he'll be here, you know, when (IA) Bubba, you know, they went someplace. But you can come here, you understand, and I'll tell you where he be at and everything.

S-1: Well, dig this, see what I'm talkin' about, George, well,



I'm gonna get you that, take you to the man then wait here, they go around the corner and they have the stuff when they get out there, you know, a, just be a lot of bull shit like they coppin' from that guy, they already had it when they go out there and while they around the corner, they go on in and bull shit around and come right back with some bull shit.

BLAIR: Uh huh.

S-1: And then there won't be nothin' and then I can't,

BLAIR: Hey a, where you at, now, man?

S-1: I'm on, I'm over here on LaSalle.

BLAIR: La Salle?

S-1: Uh huh.

BLAIR: What's the number?

S-1: I have to find out the house number.

BLAIR: OK

S-1: OK?

BLAIR: OK

S-1: Hold on.

Short pause

BLAIR: No, I'm gonna come and pick you up.

S-1: You gonna come pick me up?

BLAIR: Yeah, that's what I'm gonna do, because you said you wanted to be here, didn't you?

S-1: Yeah, well, I tell you what, well, I tell you what you do.

BLAIR: Yeah.

S-1: Well, see, we driving, let's say, we can meet you somewhere, where you want us to meet you at?

BLAIR: A, hey a, (IA to background) 9,

S-1: Huh?

BLAIR: 19315

S-1: 19315. Lemme get a pencil, George.

BLAIR: OK

S-1: (IA to background) Hold on, we tryin' to get a pencil. You know, we been tryin' and



runnin' and he ain't got nothin', you know?

BLAIR: Uh huh.

S-1: I told my man, you know, I said I finally found my man, you know. We been, look here, George, we spend 75, you know.

BLAIR: Uh huh.

S-1: 24

BLAIR: A, we can't, you can't talk like that,

S-1: Yeah.

BLAIR: But a, you know, everything is guaranteed, my man.

S-1: Yeah.

BLAIR: You know, whatever I, you know I say, it's a guarantee, ain't no bull shit.

S-1: Well, that's 19,

BLAIR: 315.

S-1: 315.

BLAIR: Yeah.

S-1: 19315.

BLAIR: Uh huh.

S-1: What's the street?

BLAIR: A, Hubbell.

S-1: Hubbell?

BLAIR: Uh huh.

8. S-1 stated after the conversation that he talked to a man that he knew as George BLAIR to set up the purchase of one eighth kilogram of heroin, 30 quarters of heroin.

9. Following the conversation S-1 and Special Agent Smith drove to 19315 Hubbell, Detroit, Michigan. S-1 introduced Special Agent Smith to George BLAIR who introduced S-1 and Special Agent Smith to Eddie JACKSON. Eddie JACKSON pointed to a quantity of white powdery substance on the kitchen table which appeared to be one eighth kilogram and told Special Agent Smith "it's all yours." JACKSON also told Special Agent Smith that he preferred meeting with his customers to guarantee his "stuff", the one eighth kilogram would take 10 cuts and he would accept $4,000 for the heroin instead of his price of $4,200. While Special Agent Smith was there, he heard the telephone ring on numerous occasions which was answered by George BLAIR.

10. A chemical analysis was performed on the substance obtained from Eddie JACKSON by Lawrence O. Buer, Forensic Chemist, Bureau of Narcotics and Dangerous Drugs, Chicago, Illinois, which revealed the substance to be 29 percent heroin



hydrochloride with a total weight of 151.03 grams.

11. On November 4, 1971 S-1 placed a telephone call to 313-864-4854 and gave consent to Special Agent Smith and Special Agent Ronald Garibotto to over hear his conversation with George BLAIR or Eddie JACKSON. This conversation was recorded and a partial transcript of the conversation is as follows:

Unident. Male: Hello.

S-1: A, George please.

U/M: A, he isn't here. He be in 'bout 15 minutes.

S-1: Listen, is Jackson back yet?

JACKSON: Hello.

S-1: What do ya know?

JACKSON: What's happenin'?

S-1: I'm comin' to see ya.

JACKSON: Yeah, well I been waitin' on ya a long time.

S-1: (laugh) I'm on my way in a minute.

JACKSON: Alright, come on with it.

S-1: Yeah, OK.

JACKSON: Hey.

S-1: Huh?

JACKSON: Gemme some idea what, you know, you talkin' about.

S-1: About a eighth.

JACKSON: Yeah, alright.

S-1: I'll see ya in a minute.

JACKSON: OK.

12. Following the telephone conversation S-1 told Special Agent Smith and Special Agent Garibotto that he had just talked to Eddie JACKSON setting up a deal for one eighth kilogram of heroin. Special Agent Smith identified Eddie JACKSON's voice from Special Agent Smith's prior conversations with him.

13. Immediately after the telephone call, S-1 and Special Agent Smith drove to 19315 Hubbell, Detroit, Michigan and met with Eddie JACKSON and Courtney R. BROWN. Special Agent Smith observed Eddie JACKSON working a "sifter" as he was sifting the white powdery substance which appeared to be heroin. JACKSON then measured out one eighth kilogram of heroin which he took from what appeared to be a 3-pound clear plastic bag filled with what appeared to be heroin. Special Agent Smith paid Eddie JACKSON $4,200 for the heroin. While there, Special Agent Smith observed Courtney R. BROWN remove a similar bag of approximately



3 pounds of the white powdery substance which appeared to be heroin from a cabinet in the same house. JACKSON told Special Agent Smith that it was costing him $25,000 to get his "woman" out of jail in New York City. Special Agent Smith asked JACKSON how his business was and JACKSON replied, as he was sifting what appeared to be heroin, that "I'm just trying to turn the "stuff" over as fast as possible."

14. While in the house, Special Agent Smith heard the telephone ring numerous times which was answered by Courtney R. BROWN.

15. On September 27, 1971 Cynthia Joyce RIGGS was arrested in a New York City airport with approximately 2 kilograms of heroin in her possession. Miss Riggs' bond was attempted to be posted by Eddie JACKSON of 17533 Westhampton, Southfield, Michigan. Miss Riggs' was seen boarding an aircraft in Detroit with a destination of New York City on September 27, 1971 and was observed by an airlines official to have obtained her ticket by a companion who reached into a sack full of money to obtain the required air fare.

16. On November 4, 1971 Special Agent Smith performed the Marquis Reagent field test on the substance obtained on November 4, 1971 which reacted positively as heroin hydrochloride and contained a gross weight of 164.4 grams.

17. Special Agent Smith reviewed the taped duplicated copies of the original

taped wire interceptions before preparing these excerpts of the telephone conversations set out above and identified the voices of George BLAIR and Eddie JACKSON respectively from conversations with Eddie JACKSON and George BLAIR during the above-described distributions of narcotic drug controlled substances. Special Agent Smith related to me all of the foregoing facts and circumstances.

18. On November 5, 1971, a records check (pursuant to Special Grand Jury Subpoena) was made with Michigan Bell Telephone Company when it was determined that the telephone located at 19315 Hubbell, Detroit, Michigan telephone number 313-864-4854 was listed in the name of John G. THOMAS and was a non-published telephone listing.

19. Normal investigative procedures have not succeeded in establishing the full extent of the activities of Eddie JACKSON and George BLAIR relating to their purchase or sale of controlled substances, nor has Eddie JACKSON's and George BLAIR's source of supply been identified or established. Based on my knowledge and experience as a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs, and the experience of Supervisory Agents and other Special Agents of the Bureau of Narcotics and Dangerous Drugs, normal investigative procedures reasonably appear to be unlikely to succeed in establishing the identies of Eddie JACKSON's and George BLAIR's co-conspirators, aiders and abetters, their places of operation



for their transportation of controlled substances to the Detroit, Michigan area and for their manufacture and distribution of controlled substances within the Detroit, Michigan area, and their times, places, schemes, and manners for selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances. My experience and the experience of other Federal Agents has shown that narcotics (controlled substance) raids and searches have not, in the past, resulted in obtaining evidence of who the raided violator's co-conspirators, aiders and abetters were, and where their places of operation were to transport controlled substances into an area or manufacture or distribute controlled substances about an area. Experience has shown that controlled substance manufacturers and distributors do not keep records of their controlled substance actions. It is the experienced belief of Special Agents of Region VI that additional surveillances of JACKSON's and BLAIR's and his operation, if continued on a regular basis, will jeopardize the outcome of the investigation, and will do little to reveal the manufacture and distribution network. JACKSON and BLAIR are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units. Special Agent Smith has been unable to move any further vertically or horizontally in the JACKSON/BLAIR operation because of JACKSON's and BLAIR's extreme caution. S-1 does not personally know anymore facts concerning the JACKSON/BLAIR operation.

20. For the reasons set out hereinabove, all normal avenues of investigation are closed, and it is my belief that the only reasonable way to develop the necessary evidence to discover the other persons involved in the JACKSON/BLAIR manufacture and distribution of controlled substances network, and their locations and schemes of operation, is to intercept wire communications from the telephone utilized by Eddie JACKSON and George BLAIR located in the premises at 19315 Hubbell, Detroit, Michigan, and carrying telephone number 313-864-4854, which has been, is being, and is about to be used by Eddie JACKSON, George BLAIR and others as yet unknown, in connection with the commission of the above-described offenses.

21. No other application is known to have been made to any judge for authorization to intercept, or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein.

22. Any expenses necessarily incurred pursuant to a court order under section 2518(4)(e) of Title 18, United States Code, relating to technical assistance rendered to the Government by a communications common carrier or other person will be processed by the Bureau of Narcotics and Dangerous Drugs for payment by the United States Government, unless the court should direct otherwise.



WHEREFORE, based on the facts related above, and my experience as a Special Agent of the Bureau of Narcotics and Dangerous Drugs, I believe, and have reason to believe that the probable cause allegations stated in paragraph 3 (a), (b), (c), and (d) have been sustained.

/s/ Ronald S. Garibotto
RONALD S. GARIBOTTO
Special Agent
Bureau of Narcotics
and Dangerous Drugs
U.S. Department of Justice

Subscribed and Sworn to Before me
this 11th Day of November
1971 at Detroit Michigan

/s/ Cornelia G. Kennedy
UNITED STATES DISTRICT JUDGE

No. 79-78

# In the Supreme Court of the United States

OCTOBER TERM, 1978

EDDIE JACKSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The judgment and order of the court of appeals (Pet. App. 1a-4a) and the memorandum opinion of the district court (Pet. App. 5a-10a) are not reported.

### JURISDICTION

The judgment of the court of appeals was entered on April 17, 1979. The petition for a writ of certiorari was filed on July 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the government's application for a wire interception order sufficiently established that other investigative procedures were inadequate, as required by 18 U.S.C. 2518(1)(c).

2. Whether the seizure of narcotics in this case resulted from a warrantless entry into a private dwelling in violation of the Fourth Amendment.

## STATEMENT

After a bench trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on 13 counts of manufacturing, distributing, and possessing heroin and cocaine, in violation of 21 U.S.C. 841, and of conspiracy to commit those offenses, in violation of 21 U.S.C. 846. He was sentenced to a total of 20 years' imprisonment, a three-year special parole term, and a fine of $5,000 on each count. The court of appeals affirmed. *United States* v. *Woods*, 544 F. 2d 242 (6th Cir. 1976), cert. denied, 431 U.S. 954 (1977). Petitioner thereafter moved for vacation of his sentence under 28 U.S.C. 2255, and his motion was denied by the district court without a hearing (Pet. App. 5a-10a). The court of appeals affirmed in part and reversed and remanded in part (Pet. App. 1a-4a).[1]

Prior to the trial of the changes against petitioner, a hearing was held on his motion to suppress evidence seized at 19315 Hubbell Street in Detroit, the headquarters of a wide-ranging narcotics conspiracy headed by petitioner (R.A. 28-53).[2] Briefly, the evidence at the hearing showed that on December 15, 1971, conversations overheard pursuant to court-ordered telephone intercepts of the Hubbell Street premises indicated that a long-awaited shipment of narcotics had arrived and was being

[1] The court of appeals found that the sentences imposed on five counts were multiplicious. The partial reversal resulted in a reduction of petitioner's fine by $25,000 but did not affect the length of his prison term.

[2] "R.A." refers to the record on appeal.



distributed rapidly. Between 9:00 and 9:45 that evening, police arrested three suspected distributors shortly after they left the Hubbell Street premises, discovering quantities of narcotics on their persons. At about 9:45, DEA Agent Garibotto, en route to the home of United States District Judge Kennedy with an application for a warrant to search the Hubbell Street house, was informed of these arrests. He thereupon ordered the agents in the vicinity to arrest petitioner and the other occupants of the house immediately. When the occupants failed to respond to knocks, the agents forced entry into the premises and made the arrests. At that time the agents observed narcotics in plain view. At approximately 10:00 p.m., Agent Garibotto was notified of the arrests and that narcotics had been found, and he added this information to his affidavit. Judge Kennedy issued the search warrant shortly thereafter. The subsequent search of the house revealed large quantities of heroin and cocaine. Pet. App. 24a-26a.

## ARGUMENT

Petitioner contends that he is entitled to vacation of his sentence under Section 2255 because the government's showing in its application for a telephone intercept order that other investigative procedures were inadequate, as required by 18 U.S.C. 2518(1)(c), was false and misleading, and because the seizure of narcotics from the Hubbell Street house resulted from an invalid warrantless entry to arrest its occupants. Since both of these claims were considered and rejected on the merits by the court of appeals on direct appeal (Pet. App. 16a-17a, 24a-28a), the court below, in denying petitioner Section 2255 relief, correctly declined to reconsider them (Pet. App. 1a-2a, 6a-7a). See *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969); *Sanders* v. *United States*, 373 U.S. 1 (1963);

*Polizzi* v. *United States*, 550 F. 2d 1133, 1135-1136 (9th Cir. 1976); *Stephan* v. *United States*, 496 F. 2d 527, 529 (6th Cir. 1974). There is accordingly no reason for this Court to grant further review. In any event, petitioner's claims lack merit.

1. Petitioner argues that the application for the intercept order was false and misleading because it failed to reveal that a government informant had been offered and had declined a responsible position in petitioner's organization.[3] But as the court of appeals found on direct appeal (Pet. App. 17a), it was unlikely that even in that position the informant would have learned "all the complex details of the widespread organization, and its aiders and abettors." Moreover, "in view of [the informant's] lengthy prior criminal record, the government would have had great difficulty in establishing criminal liability by his testimony alone."[4] In any event, the use of an informant was not withheld from the court; the intercept application expressly stated that the government had received some of its information from a confidential informant (Pet. App. 42a). The chance that the informant might have been able to obtain additional information was immaterial, and the omission of this speculative possibility from the application did not affect the validity of the authorization. See *United States* v. *Pacheco*, 489 F. 2d 554, 565 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975).

[3]Petitioner unsuccessfully raised this issue in his petition for a writ of certiorari seeking review of the affirmance of his conviction on direct appeal (Pet. No. 76-1360 at 22-31).

[4]To have outfitted the informant with a transmitter and recording device, as petitioner proposes (Pet. 23), would have seriously jeopardized not only his safety but also the success of the entire investigation, because of the risk that the devices would be discovered.



Nor does *Franks* v. *Delaware*, 438 U.S. 154 (1978), entitle petitioner to a hearing on his claim. *Franks* requires the defendant to make a substantial preliminary showing that the alleged misstatement is material and intentional (438 U.S. at 155-156, 171-172). Even if the failure to mention a possible source of information in the application for the intercept order constitutes a misstatement of the sort to which *Franks* applies (but see Pet. App. 9a), petitioner has failed to make the necessary preliminary showing. Since, as both courts below found on direct appeal, the inclusion of the omitted information would not have suggested that an intercept order was unnecessary, the omission of the information was not material. Petitioner was accordingly not entitled to a hearing under *Franks*.

2. Petitioner's contention that the agents' warrantless entry into the Hubbell Street house was a pretext to search it for narcotics, rather than to arrest him, is likewise without merit.[5] The entry was justified by exigent circumstances. Both the district court and the court of appeals credited Agent Garibotto's testimony that the decision to make the arrests immediately, rather than waiting for a warrant, resulted from the fast-breaking situation with which agents were faced. Telephone conversations intercepted from the premises on December 15 indicated that a long awaited shipment of narcotics had arrived. The arrests of three persons within a 45 minute period that evening as they left the premises and the discovery of narcotics in their possession, together with the interception of outgoing calls from the house setting up additional sales, established that the narcotics were being distributed rapidly. As the court of appeals found on direct appeal (Pet. App. 27a), "[t]here was real concern

[5]Petitioner does not contend, as indeed he could not, that the agents lacked probable cause to arrest him.

for preventing the unlawful distribution of a large shipment of narcotics to other purchasers, as well as a desire to effect the arrests while there was sufficient manpower available." These concerns justified immediate entry into the Hubbell Street premises to make the arrests. See *United States* v. *Johnson*, 561 F. 2d 832 (D.C. Cir. 1977) en banc.[6]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]The issue of the legality of a warrantless entry into a private dwelling to arrest its occupant *absent* exigent circumstances, currently before this Court in *Payton* v. *New York*, No. 78-5420, and *Riddick* v. *New York*, No. 78-5421, restored to the calendar for reargument April 30, 1979, is not presented by this case.

*The Solicitor General is disqualified in this case.

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